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In The

Supreme Court of the United States

SIMANT VERMA,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition For Writ Of Certiorari To The Arizona Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether It Was Error When The Trial Court Decided Not To Answer The Jury's Question Regarding The Definition Of "Willfully"?[1]

2. Whether The Trial Court Erred When It Did Not Inform Verma Of His Right *Not* To Testify?

[1] All excerpts of record referenced herein were attached to the filing of Petitioner's Opening Brief with the Arizona Court of Appeals Petition for Review with the Arizona Supreme Court.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. There is no corporate disclosure statement required in this case under Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Simant Verma (hereinafter "Petitioner" or "Verma") respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

A copy of the Order of the Arizona Supreme Court denying Verma's Petition for Review is annexed as Appendix A. A copy of the Order and Memorandum Decision of the Arizona Court of Appeals, Division One, affirming Verma's conviction is annexed as Appendix B. A copy of the jury verdict from the Maricopa County Superior Court, State of Arizona, is annexed as Appendix C.

JURISDICTION

The date on which the Arizona Supreme Court filed its order denying Appellant's Petition for Review was April 18, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

a) Fifth Amendment to the United States Constitution

b) 28 U.S.C. §1257

STATEMENT OF THE CASE

Verma was convicted of unlawful flight, a violation of A.R.S. §28-622.01, a class 5 felony. He had also been charged with misdemeanor harassment, but he was acquitted of that charge.

There was no testimony that Verma saw the officers in the parking lot, or that he was then attempting to flee. The officers did not turn on their overhead lights until they were off the YMCA property and past the first traffic signal. *See* Transcript (hereinafter "T") of 11/22/2005, p. 160-61 (Officer Piech); T. 11/22/2005, p. 165 (Officer Arnold). The Officers tailed Verma and turned on their lights and sirens. *Id.*, p. 148. The Officers were not directly behind Verma. Officer Arnold described the position of the three cars:

> "I didn't follow the vehicle closely. I left a big gap in between him so that he could stop his vehicle . . . Because there was such a big gap in the vehicles, Officer Piech had also followed behind my vehicle and he got in between that gap so he closed it up somewhat, but he wasn't like directly on his tail."

Id., p. 165-66. Verma did not stop, but neither did he attempt to elude the officers. The speed limit for the road (59th Avenue) was 40 mph. *Id.*, p. 153. Verma's speed was variously described by the officers as at or below the limit. *Id.* (Officer Piech: "about 40 miles an hour"); *Id.*, p. 166 (Officer Arnold: " . . . it was going 40, 35 miles per hour, it was going just a little bit slower than normal traffic.")

The distance of the "chase" was three-fourths of a mile. *Id.*, p. 158 (Officer Piech). Although Verma did not stop for the two officers, he took no evasive actions, or otherwise attempted to elude the officers. *Id.*, p. 157

(Piech). After following Verma for less than a mile, the officers gave up and drove back to the YMCA parking lot to talk to the victim. *Id.*, p. 166 (Officer Arnold); *Id.*, p. 154-55 (Officer Piech).

In the meantime, a Glendale police sergeant spotted Verma, turned on his emergency lights, and Verma pulled over. T. 11/23/2005, p. 28. Verma was arrested for unlawful flight and harassment. T. 11/22/2005 p. 169. Verma was acquitted of the harassment charge and convicted on the unlawful flight charge. Verma's sentence was a five hundred dollar fine. T. 1/4/2006, p. 16.

Verma timely filed a notice of appeal. The Arizona Court of Appeals affirmed Verma's convictions. *See* Appendix B. Verma filed a Petition for Review with the Arizona Supreme Court; however, the Arizona Supreme Court denied review. *See* Appendix A.

REASONS FOR GRANTING THE WRIT

Verma's conviction was obtained in violation of his rights under the United States Constitution. Verma contends that the trial court's inadequate instruction on the definition of "willfully," coupled with the erroneous answer to the jury question about the definition of "willfully," requires reversal, especially in the light of the unusual facts of this case. Furthermore, Verma contends that his Fifth Amendment right against self-incrimination was violated, and the trial court committed reversible error, when the court did not inform Verma of his right *not* to testify.

I. The Court Erred In Deciding Not To Answer The Jury's Question Regarding The Definition of Willfully.

The inadequate instruction on the definition of "willfully," coupled with the trial court's erroneous answer to the jury question about the definition of "willfully," requires reversal, especially in the light of the unusual facts of the "chase" involved in this case.

Just before closing arguments, the judge instructed the jury on the elements of unlawful flight. On November 23, 2005 the jurors began deliberating. They were unable to arrive at a verdict that day. ME-28. The jury returned to deliberate on November 28, 2005 at 8:30 a.m. Two hours later, they acquitted Verma on the harassment charge. ME-38; T. 11/28/2005 (verdict), p. 3. However, the jury notified the court that they were hung on the felony (unlawful flight) charge. T. 11/28/2005, p. 4. The judge asked the jury to deliberate further. *Id.*, p. 5-6. Later, the jury asked the following question about the *mens rea* of the unlawful flight charge: "Can we get clarification on the following: Can the phrase "willfully fled" be substituted with "willfully continued to drive?" Does it change the flavor of the unlawful flight?" T. 11/28/2005, p. 6.

The judge told the jurors that the legislature defines crimes and, that the phrase had an "ordinary understanding." *Id.*, p. 6. The judge acknowledged that the jurors did not agree on the meaning of the phrase, but said, "I am not allowed to answer your question. It is not my job." *Id.*, p. 7.

The jurors did not give up. They followed their unanswered question with a similar one: "[t]o what extent can we consider intent on count 2?" *Id.*, p. 8. (Count 2 was the unlawful flight charge). The judge responded that the

intent requirement was "willfully fled," which of course related back to the jurors first question.

The judge told the jurors that proof of willful conduct was something different, and something less, than proof of intentional conduct. *Two minutes* after being sent back to deliberate, the jury convicted Verma of the unlawful flight charge.

The jury was not given accurate answers to its questions about the meaning of willfully. The prosecutor said there was no definition, but there actually was. A review of the unlawful flight statute shows that "willfully" is one of the ten annotated "notes of decisions" regarding use and definition of "willfully" in unlawful pursuit cases. *Arizona v. Gendron*, 166 Ariz. 562, 804 P.2d 95 (App. 1990) *vacated in part on other grounds by* 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991).

The Arizona Court of Appeals in *Gendron* resolved the question about whether "willfully" had been defined within the unlawful flight context:

> "Gendron's assertion that there is no statutory definition of "willfully" is incorrect. A.R.S. §1-215(36) defines "willfully" to mean: "that a person is aware of or believes that his conduct is of that nature or that the circumstance exists."

Id. at 564, 804 P.2d at 97. *Gendron* also reveals that the judge's comments about the relationship between willful and intentional conduct were wrong. The judge told the jurors that willful conduct was something less than intentional conduct.

Based on this comment, the erroneously instructed jurors may have believed that the flight charge was a

negligence or strict liability offense. The error was fundamental and a violation of due process, going to the heart of the case. The facts of the "chase" were unusual. Even the state recognized this was an unusual case. After conviction, the state asked only for probation. T. 1/4/2006, p. 13.

There was none of the dangerous driving usually involved in a pursuit. Verma did not run lights, speed, or swerve. Furthermore, unlike the usual chase where a criminal flees for obvious reasons (i.e., leaving the scene of a crime or a felony warrant), there was no motive for Verma to run. The state suggested that Verma "fled" because he had committed a crime by bothering the "victim." T. 11/23/2005, p. 128. However, the benign circumstances of Verma's contact with her, coupled with the harassment acquittal, indicate that Verma was oblivious to the fact that police were after him. In fact, Verma testified that because the police officers were so far behind him, he did not realize that they were after him. T. 11/23/2005, p. 72. In fact, Verma was acquitted of the assault charge.

This jury convicted because the judge not only failed to instruct them originally with the definition of willfully, the Court went on to erroneously advise the jury when telling them that "willfully" meant something less than intentionally. The inadequately and erroneously instructed jurors ended up believing that the unlawful flight charge was a negligence or strict liability offense.

The usual State response to an argument like this one is that the error is harmless. Under the unusual facts of this case though which is supported by the jury's very long deliberation in this case, a correctly instructed jury would have found Verma not guilty of unlawful flight.

II. The Court Erred In Not Informing Petitioner of His Right Not To Testify, Which Violated Petitioner's Rights Pursuant To The Fifth Amendment Of The United States Constitution.

A defendant has a fundamental right *not* to testify. The judge must advise the defendant of this fundamental right to ensure that the waiver of the right is voluntary and intelligent. Verma testified at his trial. T. 11/23/2005, p. 49-99. Before he testified, the judge did not advise him of this right to testify.

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Harris v. New York,* 91 S. Ct. 643, 645 (1971); *accord: Rock v. Arkansas,* 107 S. Ct. 2704 (1989). The Supreme Court has held that "waiver is ordinarily an intentional relinquishment or abandonment of a known right . . . ," that the court does not "presume acquiescence in the loss of fundamental rights," and that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 58 S. Ct. 1019, 1023 (1938).

However, the Arizona Supreme Court has twice held that trial courts are not required to inform defendants before or during trial, of their right to testify:

> "Although we think that in an appropriate case it may be prudent for a trial court to have a defendant make an on-the-record waiver of the right to testify, [cites omitted], it is generally not required under Arizona law. We conclude that defendant was not denied his right to testify and is not entitled to a new trial based on the failure to make an on-the-record waiver."

State v. Gulbrandson, 184 Ariz. 46, 906 P.2d 579 (1995). "Thus, a *sua sponte* inquiry by the trial court as to whether a defendant desires to testify is neither necessary nor appropriate." *State v. Allie,* 147 Ariz. 320, 328, 710 P.2d 430, 438 (1985).

At first blush, one might think that if judges have no obligation to inform defendants of their right to testify, than they would not have to inform defendants of their right *not* to testify either. However, there are several reasons why the right *not* to testify should be protected even more carefully than the right to testify, and why an advisement would be necessary for a testifying defendant and not for a defendant who was not testifying.

First, any citizen would assume that if he were on trial, he would have the right to testify; that he could take the stand and explain to the jury his version of the events leading to his arrest. Because people are aware of their right to testify, there is no need for judges to state the obvious to defendants.

Not only are most people aware of their right to testify, most would also assume that their testimony is required – that they cannot refuse to testify. Furthermore, even if they were aware of their right to refuse to testify, it is unlikely that many people are aware that the judge will tell the jury not to hold their "failure" to testify against them. As the Ninth Circuit Court commented: " . . . one would expect the right not to testify to be more zealously guarded than the right to testify. An uniformed defendant probably expects to testify and may be unaware of how strongly the Constitution protects his right not to testify." *United States v. Martinez,* 883 F.2d 750, 756 (9th Cir. 1989).

The Considerations discussed above explain why the right *not* to testify has been held by many federal and state courts to be right "more fragile," than the right to testify. *Johnson v. State,* 169 S.W.3d 223, 234 (Tex. App. 2005) (cases citied in fn. 60). The right not to testify, and the right to have the jury instructed not to consider the decision not to testify, are less well-known to ordinary citizens than the right to testify. These are the reasons that this court may distinguish Arizona's *Gulbrandson* and *Allie* decisions, and require an advisement about the right *not* to testify as protected by the Fifth Amendment to the United States Constitution.

A West Virginia Supreme decision is on point, and the court agreed with the argument advanced here by Petitioner. In *State v. Robinson,* 376 S.E.2d 606 (W.V. 1988), the defendant testified at trial without being advised by the court that his right *not* to testify was a fundamental right, and that the court had failed to advise the defendant of that right to ensure that he was voluntarily waiving it. *Id.*

There are also cases that have rejected this argument. In *People v. Mozee,* 723 P.2d 117 (Colo. 1986), it was held that defendants did not need to be told of their right *not* to testify. The court agreed that by testifying, defendants waive a constitutional right, and that "a waiver of the right to remain silent resulting from an election to testify must be made by the defendant personally and must be made voluntarily, knowingly and intelligently if it is to be effective." *Id.* at 123. But, the court rejected the argument that defendants had to be advised of their right *not* to testify. The reason was that "the court is already required to advise the defendant, at the defendant's first appearance, of the constitutional right to remain silent." *Id.* at

124. A second reason was that lawyers, "acting in a good faith and with zeal to prevent the client's conviction, might overbear a defendant's desire to testify," but would not hinder a defendant who wished to remain silent. *Id.* at 124-25.

Mozee is unhelpful because Arizona, unlike Colorado, does not require arraignment judges to advise defendants of their right to remain silent. Arizona's arraignment rule, (Ariz.R.Crim.P. 14.3) requires judges to inform defendants of their court dates and their right to a jury trial, but not their right to testify (or not testify) at trial, or their right to remain silent generally.

There would also be practical ramifications in ruling for Petitioner that a defendant's rights pursuant to the Fifth Amendment of the United States Constitution requires the court to advise the defendant of his right *not* to testify. A ruling in favor of Petitioner on this issue would merely require a quick advisement from the judge, which for example could have been handled in this case after the State had rested and the defense was making its motion for a directed verdict while the jury was still outside the courtroom. Requiring judges to make such an advisement would take seconds during trial, and would prevent the waste of time lawyers and judges spend on petitions for post-conviction relief in which defendants allege that their defense lawyers never advised them of their rights to testify or not testify.

CONCLUSION

Based upon the foregoing, Petitioner requests that this Court grant certiorari on theses issues and overturn his conviction and remand this case.

RESPECTFULLY SUBMITTED this 10th day of July 2007.

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Simant Verma

APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. SIMANT VERMA, Appellant.	1 CA-CR 06-0050 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court) (Filed Oct. 10, 2006)

Appeal from the Superior Court in Maricopa County

Cause No. CR2005-007712-001 DT

The Honorable Barry C. Schneider, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

Neal W. Bassett — Phoenix
Natalee Segal
Attorneys for Appellant

SNOW, Judge

¶1 Defendant, Simant Verma, appeals from his conviction on one count of unlawful flight from a law enforcement vehicle. He claims (1) that the trial court erred in not defining the word "wilfully" for the jury but specifying that "willfull" conduct was not intentional conduct, and (2) that the court erred in not advising him that he had the right

not to testify at trial. For reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Defendant. *State v. Fontes,* 195 Ariz. 229, 230, ¶2, 986 P.2d 897, 898 (App. 1998).

¶3 In October 2004, Defendant and Lisa, the victim, both worked out at a YMCA in Glendale, Arizona. On separate occasions over the course of several months, Defendant approached Lisa at night in the parking lot as she was walking to her car. On those occasions, he tried to initiate a relationship with her. On one occasion, he came up to her car window and told her that he had something for her in his car.

¶4 Lisa became increasingly concerned and frightened at being approached by Defendant while she was alone late at night. She told Defendant that she "was not interested," and that she was "uncomfortable" at his approaching her in the parking lot and wanted him to stop. She also told him that she had a boyfriend and was "not interested at all whatsoever," but he persevered. She feared that he was becoming "more aggressive" towards her. Finally, in February 2005, after defendant left a bouquet of roses on the hood of her car, Lisa walked back into the YMCA and called the police.

¶5 Glendale Police Officer George Arnold arrived as Defendant's Honda was pulling out of the YMCA parking lot. Officer Arnold turned his vehicle around and got directly behind Defendant's vehicle when it stopped at a

red light at the intersection of Country Gables Road and 59th Avenue. Officer Piech, who also responded to the call, pulled his vehicle directly behind Arnold's. Both officers were in fully marked patrol vehicles.

¶6 As the light turned green, Defendant proceeded through the intersection, southbound on 59th Avenue. Both officers turned onto 59th Avenue behind him and activated the overhead emergency lights on their vehicles to initiate a traffic stop. When Defendant's car gave no indication of stopping, both officers also turned on their emergency sirens "because the car would not pull over." At some point, Piech shined his spotlight into Defendant's Honda to "also give another indicator to the driver that we were behind him and wanted him to stop."[1] Arnold stated that he kept his patrol car "two to three car lengths" behind Defendant's vehicle so that Defendant could stop his vehicle.

¶7 Arnold and Piech continued to follow him for approximately three-quarters of a mile. At the intersection of Thunderbird and 59th Avenue, when Defendant still did not stop, the police called off the pursuit in accord with Glendale Police Department policy.

¶8 A third Glendale officer, Sergeant Livingston, spotted Defendant's vehicle as it continued to travel on 59th Avenue. Livingston was also in a fully marked patrol vehicle. He pulled his vehicle alongside Defendant's Honda and followed it for a short distance "to observe how the driver was going to behave." After, they had proceeded

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[1] Arnold testified that, while Defendant did not stop, other traffic on the other side of the roadway was stopping and pulling over as they passed.

through an intersection, Livingston activated his emergency lights, and Defendant pulled over in the entrance to a park.

¶9 Livingston summoned Arnold, who arrived at the scene and arrested Defendant. Defendant told Arnold that he did not pull over for them because "he did not know what was going on" and "was afraid to stop."

¶10 The State charged Defendant with one count of misdemeanor harassment and one count of unlawful flight from a law enforcement vehicle, a class 5 felony. Defendant pled not guilty and proceeded to trial.

¶11 Defendant testified at trial that the victim had never told him to leave her alone or that she wanted him to stop approaching her in the parking lot. He maintained that he had no intention of harassing or harming her but just wanted to be her friend. He also testified that, while he saw the flashing lights on the patrol vehicles behind him, he was "unaware" that the police wanted him to stop because "they were a very long distance" and "not right behind [him]." He did not think he had committed any crime. He could not "remember" hearing sirens, but stated that his car windows were closed and he might not have heard them. Defendant also maintained that it was "too late" for him to stop his car at Thunderbird because the light was green. He testified that he intended to pull over after crossing the intersection, but the patrol cars stopped following him.

¶12 The jury acquitted Defendant of the harassment charge, but found him guilty of unlawful flight. Based on "the consideration of events, the background, the lack of prior involvement . . . in the criminal justice system," the trial court sentenced defendant to pay a fine of $500.00

plus a $5.00 surcharge.[2] This timely appeal followed. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031, -4033 (2001).

DISCUSSION

(1) Failure to Define "Wilfully" in Jury Instructions

¶13 Defendant argues that the trial court erred in not defining the word "wilfully" for the jury. Defendant acknowledges that he did not request the trial court to instruct the jury on the term "wilfully." He has therefore forfeited the right to appellate relief on this issue save in the rare instance that we find fundamental error. *State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶14 Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980,

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[2] The State advises that this is an illegal sentence because the trial court was required by statute to sentence Defendant to a term of imprisonment or to suspend sentence and place Defendant on probation. A.R.S. §§ 13-701(A) (2001), 13-702, -702.01(B)(4) (Supp. 2005), 13-901(A) (Supp. 2005). However, it did not object below, cross-appeal, nor challenge the sentence imposed. We therefore need not address this issue. *See State v. Kinslow,* 165 Ariz. 503, 507, 799 P.2d 844, 848 (1990) (reviewing court will not correct sentencing errors that benefit a defendant in the context of defendant's own appeal absent proper appeal or cross-appeal by the state).

982 (1984)). Furthermore, to prevail on this basis Defendant bears the burden of establishing that fundamental error exists. *Id.* at ¶ 20. Having reviewed the record, we find no error, let alone fundamental error.

¶15 Without objection, the trial court instructed the jury that the crime of unlawful flight from a law enforcement vehicle required three things:

> (1) The defendant willfully fled from or attempted to elude a pursing [sic] law enforcement vehicle; and
>
> (2) The law enforcement vehicle was appropriately marked showing it to be an official law enforcement vehicle; and
>
> (3) The law enforcement vehicle while in pursuit used an audible siren and emergency lights.

The jury retired to deliberate, and subsequently sent the following request to the court: "May we have a dictionary for the definition of the word "fled." With both counsels' concurrence, the trial court replied as follows: "We will not give you a dictionary but we will tell you the definition. Flee means to run away from." The jurors returned to their deliberations but adjourned without reaching any verdicts.

¶16 The jury resumed its deliberations the following week. After deliberating for some period of time, it informed the trial court that it had reached a decision on the harassment count but was "at an impasse" on the unlawful flight charge "7 to 1 in favor of guilty. Please advise." The trial court summoned the jury, and it returned a "not guilty" verdict on Count I.

¶17 The trial judge then exhorted the jurors to return to the jury room to consider if there was "any hope that the impasse will be broken" and to let him and the attorneys know if there was anything else that would assist them. After a brief recess, the jurors returned to the courtroom with two additional questions.

¶18 First, the jury asked: "Can we get clarification on the following: Can the phrase 'willfully fled' be substituted with 'willfully continued to drive?' Does it change the flavor of Unlawful flight?" The trial court responded, without objection, as follows:

> This is a question I am not really empowered to answer for you. The legislature defines what the elements of an offense are. The legislature used the words "willfully fled." It's not for me, it's not my job, not my responsibility, I have no authority to interpret those words for you.
>
> These are words, I think in my opinion, that have ordinary understanding. They are words we use in everyday life, and it is not for me to give you my spin on what those words mean.
>
> This is what the jury has, the instructions which are the embodiment of the statute. The statute uses the words "willfully fled." You must decide whether the State has proved beyond a reasonable doubt that the defendant willfully fled and met the other element, other requirements in the statute. That's the jury's job and it would be improper for me to interfere with that function of the jury.
>
> So I can't answer your question. I'm not allowed to answer your question. It's not my job. That's

> the distinction between the judge and the jury. So these are words of ordinary understanding.
>
> Admittedly, you apparently don't agree on what those words mean, but that's what jury's do. They discuss what these words mean, and there's no formula or definition I can give you that – or should I be allowed to give you that would eliminate that debate amongst you.

¶19 The jury then submitted a second question: "To what extent can we consider intent on Count 2." After a bench conference, the trial court responded as follows:

> [T]he answer is that the legislature has defined as an element of unlawful flight from law enforcement vehicle, one of the three things that must be proved is that the defendant willfully fled. Willfully fled is not intentionally fled.
>
> If the legislature intended to use the mental state of intentionally, they would have said intentionally fled. They said – they used different words. Its not for me to define what they – what those words mean in this context.
>
> In Count 1 there was a definition of the word intentionally. That was one of the mental states that applied to the crime of harassment as defined by the legislature. In Count 2, intentionally is not an element of the offense, It is not a mental state that needs to be proved. What needs to be proved is the mental state of willfully, and it's for you to determine what that means.
>
> [N]ow the definitions that I gave to you for intentionally or knowingly as to Count 1 were definitions that the legislature has given us. They have other contexts. Let me just check quickly, but we

> checked this before and I'm pretty sure that willfully is not defined, whereas knowingly and intentionally are.

¶20 At that point, the trial judge asked both counsel if he was correct in thinking that the legislature had not defined "willfully." The prosecutor replied, "That's correct judge." The record shows no response by defense counsel.[3] Before allowing the jury to retire, the trial judge then concluded:

> So if you have any complaints, write to your legislator. They are the ones that didn't do their job in this context, and its not for me to make up a definition. They define it, the instructions I give you are from the statutes are what the legislature has defined. So that's my answer to the last question.

After a "brief recess," the jury returned its verdict of guilty on Count 2.

¶21 Defendant maintains that the trial court committed fundamental error because it instructed the jury that "wilfully" meant "something less than intentionally." As the foregoing illustrates, this the trial court did not do. Instead, the trial court properly and consistently instructed the jury pursuant to the language of the unlawful flight statute that the State had to prove that Defendant "willfully fled." A.R.S. § 28-622.01 (2004). An instruction that properly tracks the language of the statute does not

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[3] The Arizona Legislature has actually defined "willfully" in this context. *See* A.R.S. § 1-215(36) (Supp. 2005) ("'Wilfully' means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that the person's conduct is of that nature or that the circumstance exists.").

misstate the law. *State v. Morales,* 198 Ariz. 372, 374, ¶ 4, 10 P.3d 630, 632 (App. 2000). *See also, e.g., State v. Lopez,* 163 Ariz. 108, 113, 786 P.2d 959, 964 (1990) (stating that instruction that tracks statutory language in defining alternate ways for finding "dangerousness" not duplicitous).

¶22 Furthermore, when a jury is properly instructed on the relevant law, a trial court is not required to provide additional instructions that do no more than reiterate or expand on the instructions. *Morales*, 198 Ariz. at 374, ¶ 4, 10 P.3d at 632. Especially where, as here, the term has a "common meaning" that may be readily understood by a juror. *See State v. Clark*, 126 Ariz. 428, 436, 616 P.2d 888, 896 (1980) (citation omitted) (holding that court need not define words in statute that have meanings that are clear to person of average intelligence). We believe its meaning as requiring an act of will would have been apparent to the jury in this case.

¶23 In assessing the adequacy of instructions we are also permitted to consider the arguments of trial counsel. *State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823, 825 (1989). Here, Defendant's own counsel conceded that the term was a "common" one that was easily understood when he argued to the jurors in his closing argument:

> You have common sense. Willfully flee. Willfully fled. You know what that means? Simple terms, let's not be lawyered today, let's be common sense people. Trying to get away. That's what willfull flight means.

By defining wilfully fleeing as "*[t]rying* to get away," (emphasis added) defense counsel also reinforced the notion that "wilfully," as employed in the unlawful flight

statute, connotes a volitional act on the part of a driver. Under the circumstances of this case and given the trial court's instruction, it is improbable that an average juror would equate the word to mean, as Defendant speculates, that the unlawful flight charge "was a negligence or strict liability offense."

¶24 Based on our review of the record, we find that the trial court's instructions were adequate and that the jury was not misled by them. We find no error, no less fundamental error.

(2) *Failure to Advise Defendant of Right Not to Testify*

¶25 Defendant also argues that the trial court erred in not *sua sponte* advising him of his right not to testify before he took the stand. He suggests that we remand this matter for a hearing at which the trial court may inquire of Defendant whether he was aware that he was entitled not to testify. Defendant has also forfeited this argument, save foray finding of fundamental error, as he did not raise it before the trial court. *Henderson,* 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. We find no error or cause to remand.

¶26 As Defendant acknowledges, our supreme court has previously noted that "a *sua sponte* inquiry by a trial court regarding a defendant's right to testify is neither necessary nor appropriate." *State v. Gulbrandson*, 184 Ariz. 46, 65, 906 P.2d 579, 598 (1995). Furthermore, the decision whether or not to testify is a tactical decision that a defendant normally makes in conjunction with his defense counsel and does not involve the court. *See, e.g., State v. De Nistor*, 143 Ariz. 407, 415, 694 P.2d 237, 245 (1985) (reviewing counsel's advice not to testify in context of

ineffective assistance claim by defendant). *See also, United States v. Goodwin,* 770 F.2d 631, 637 (7th Cir. 1985) (primarily the responsibility of defense counsel, not trial judge, to advise client on whether or not to testify and explain tactical advantages and disadvantages of doing so).[4] Therefore we do not find that the trial court erred in not *sua sponte* advising Defendant about his right not to testify.

---

[4] As the State points out, a majority of the jurisdictions that have considered this question agree that a trial court does not have a responsibility to advise the defendant. *See, e.g., United States v. Wagner,* 834 F.2d 1474, 1483 (9th Cir. 1987) (stating that it is the primary responsibility of defendant's counsel, not trial judge, to advise defendant on whether or not to testify and advantages or disadvantages thereof); *State v. Lewis,* 12 P.3d 1233, 1237 (Haw. 2000) (holding trial court is not required to engage in colloquy if defendant chooses to testify in his or her behalf); *People v. Ring,* 232 N.E.2d 23, 28 (Ill. App. Ct. 1967) (providing that where defendant is represented by counsel who is fully qualified to apprise defendant of his rights and no indication counsel failed to do so, no duty of trial court to advise of right to remain silent); *State v. Stevens,* 192 A.2d 73, 77 (Md. 1963) (holding that where appellant was called to the stand by his attorney, court was not required to advise him of his right not to testify); *People v. Martin,* 389 N.W.2d 713, 717 (Mich. Ct. App. 1986) ("[w]here appellant [is] called to the stand by his counsel . . . there is no requirement that the court advise him of his right to refuse to testify").

But see, State v. Robinson, 376 S.E.2d 606, 611 (W.Va. 1988) (stating that a trial court exercising appropriate concern for constitutional right to testify should seek to assure defendant's waiver is voluntary). We think that *Robinson*, which Defendant cites, is distinguishable. There defense counsel apprised the trial court *in camera* that defendant wanted to testify "but wished to limit his testimony to events that occurred after 1983." *Id.* After a discussion regarding the scope of cross-examination, the trial court ruled that the prosecution could inquire into any matter relevant to the charges. *Id.* After unsuccessfully asserting his right against self-incrimination, on cross-examination defendant admitted his involvement in crimes in 1981 and 1982. *Id.* It is unclear from the opinion whether defendant was aware that he would not be able to limit his testimony if he chose to testify.

CONCLUSION

¶27 For the foregoing reasons, we affirm Defendant's conviction.

/s/ G. Murray Snow
G. MURRAY SNOW,
Presiding Judge

CONCURRING:

/s/ Daniel A. Barker
DANIEL A. BARKER, Judge

/s/ Donn Kessler
DONN KESSLER, Judge

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. SIMANT VERMA, Appellant.	1 CA-CR 06-0050 DEPARTMENT A Maricopa County Superior Court No. CR2005-007712-001 DT **ORDER** (Filed Oct. 10, 2006)

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its Memorandum Decision.

IT IS ORDERED that the Memorandum Decision be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this order together with a copy of the Memorandum Decision be sent to each party appearing herein or the attorney for such party and to the Honorable Barry C. Schneider, Judge.

DATED this 10th day of October, 2006.

/s/ G. Murray Snow
G. MURRAY SNOW, Presiding Judge

Maricopa County Superior Court
CR2005-007712-001 DT

A true copy of the foregoing was mailed October 10, 2006 to:

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Philip G Urry, Clerk
By

/s/ Mary LeVar
Deputy Clerk

APPENDIX B

[SEAL]

Supreme Court

STATE OF ARIZONA

RACHELLE M. RESNICK
CLERK OF THE COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (802) 452-5396

April 18, 2007

RE: STATE OF ARIZONA. v SIMANT VERMA
Arizona Supreme Court No. CR-06-0446-PR
Court of Appeals Division One No. 1 CA-CR 06-0050
Maricopa County Superior Court No. CR2005-007712-001 DT

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 17, 2007, in regard to the above-referenced cause:

ORDERED: Appellant's Petition for Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 18th day of April, 2007.

Rachelle M Resnick, Clerk

TO:
Joseph T Maziarz, Assistant Attorney General, Arizona Attorney General's Office
Florence M Bruemmer, Law Office of Florence M Bruemmer P C
Philip G Urry, Clerk, Court of Appeals, Division One, Phoenix
West Publishing Company
Lexis Nexis
dk

APPENDIX C

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2005-007712-001 DT 11/28/2005

HONORABLE BARRY C SCHNEIDER

CLERK OF THE COURT
D. Raybon
Deputy

STATE OF ARIZONA

v.

SIMANT VERMA (001)

FILED: 12/01/2005

RAYMOND K WOO

ROBERT D WOOTEN

APO-CCC
VICTIM SERVICES DIV-CA-CCC

TRIAL MINUTE ENTRY
DAY 3

8:30 a.m. LET THE RECORD REFLECT that the jury is all present in the jury room and resume their deliberations from November 23, 2005.

State's Attorney:	Raymond Woo
Defendant's Attorney:	Robert D. Wooten
Defendant:	Not Present
Court Reporter:	Cindy Lineburg

10:40 a.m. The jury is all present in the jury box and by their presiding juror return into court their verdict, which is read and recorded by the clerk as follows:

"We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the Defendant Simant Verna, as to the charge of Count 1: Harassment,

X Not Guilty."

The jury is polled and each juror replies that this is his/her verdict.

Let the record reflect that the Court has received a note from the jury regarding Count 2. The jury is asked by the Court if it believes that, with further deliberations, it may be able to reach a verdict on Count 2 within a reasonable period of time.

FILED: Jury Note (1)

The jury replies that it would like to deliberate further in the jury room as to Count 2.

10:43 a.m. Court stands at recess.

10:57 a.m. Court reconvenes with respective counsel present. The jury is present.

Court Reporter, Cindy Lineburg, is present.

Let the record reflect that the Court has received two notes from the jury. Answers are given to the jury and the jury returns to the jury room to continue their deliberations.

FILED: Jury Notes (2)

11:03 a.m. Court stands at recess.

11:05 a.m. Court reconvenes with respective counsel present. The Defendant is not present.

Court Reporter, Cindy Lineburg, is present.

The jury is all present in the jury box and by their presiding juror return into court their verdict, which is read and recorded by the clerk as follows:

"We, the Jury, duly empanelled and sworn in the above entitled action, upon our oaths, do find the Defendant

Simant Verma, as to the charge of Count 2: Unlawful Flight from Law Enforcement Vehicle,

X Guilty."

11:08 a.m. The jury is excused from further consideration in this cause and court remains in session.

IT IS ORDERED setting this matter for **Sentencing on January 4, 2006 at 8:30 a.m.** in this division. Defendant is directed to appear in person for sentencing in this case.

IT IS FURTHER ORDERED directing the Adult Probation to prepare a Presentence Investigation and Report in this matter.

ISSUED: Online Request for Presentence Investigation and Report

IT IS FURTHER ORDERED affirming the Defendant's prior release conditions.

11:10 a.m. Trial concludes.

There being no further need to retain the exhibits not offered in evidence in the custody of the Clerk of the Court,

IT IS ORDERED permanently releasing all exhibits not offered in evidence to the counsel/party causing them to be marked.

FILED: Verdicts; Exhibit Worksheet, Trial Worksheet

ISSUED: Exhibit Release Forms (2)